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TECHNICAL INFORMATION RELEASE

TIR 20-6: Tax and Licensing Provisions in An Act Modernizing Tobacco Control

DATE:

06/01/2020

REFERENCED SOURCES:

[Massachusetts General Laws](https://malegislature.gov/Laws/GeneralLaws) (<https://malegislature.gov/Laws/GeneralLaws>)

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I. Introduction

An Act Modernizing Tobacco Control (“The Act”)^{[1] (#_ftn1)} was signed into law November 27, 2019. The Act restricts the sale of certain tobacco products and imposes a new excise on vaping products, referred to as “electronic nicotine delivery systems,” or “ENDS”. It also extends the application of the existing tax rules with respect to tobacco products to ENDS by including ENDS in the definition of “tobacco products” in G.L. c. 64C. This Technical Information Release (“TIR”) explains the tax and various other provisions of the Act.

II. Law Changes

A. New Restrictions on Sales of Flavored and Unflavored Tobacco Products

The Act established new restrictions with regard to ENDS. Under new G.L. c 64C, § 7E(a), ENDS is defined as an electronic device, whether for one-time use or reusable, that can be used to deliver nicotine or another substance to a person inhaling from the device including, but not limited to, electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, vaping pens, hookah pens and other similar devices that rely on vaporization or aerosolization.^{[2] (#_ftn1)} ENDS also includes any noncombustible liquid or gel that is manufactured into a finished product for use in the device and any component, part or accessory of a device used during the operation of the device even if the part or accessory was sold separately.^{[3] (#_ftn2)} ENDS do not include products approved by the United States Food and Drug Administration for the sale or use as a tobacco cessation product or for other medical purposes that is marketed and sold or prescribed exclusively for such approved purposes.^{[4] (#_ftn3)}

As of December 11, 2019,^{[5] (#_ftn4)} the following restrictions apply to sales of ENDS:

- flavored ENDS may be sold only at licensed smoking bars for on-site consumption;
- non-flavored ENDS with a nicotine content over 35 milligrams per milliliter may be sold only at licensed, adult-only retail tobacco stores and smoking bars; and
- non-flavored ENDS with a nicotine content of 35 milligrams per milliliter or less may be sold only at retail stores licensed to sell tobacco products and smoking bars.

Beginning June 1, 2020, flavored combustible cigarettes and other tobacco products, including menthol cigarettes, flavored chewing tobacco and flavored cigars, may be sold only at licensed smoking bars only for on-site consumption. All other retailers in possession of any of these products not sold before June 1, 2020 must remove such products from their store shelves.

B. Expansion of the Definition of “Tobacco Product” in G.L. c. 64C to Include “ENDS”

General Laws Chapter 64C imposes various excises and licensing requirements upon distributors, manufacturers, wholesalers and retailers of “tobacco products.” Prior to the Act, tobacco products were defined in G.L. c. 64C, § 1 to include cigarettes, smokeless tobacco, cigars and smoking tobacco. The Act expands the definition of tobacco products to include ENDS. In addition to new licensing requirements further explained below, the inclusion of ENDS in the definition of tobacco products also subjects distributors, manufacturers, wholesalers and retailers of ENDS to various recordkeeping requirements in G.L. c. 64C, § 5 and to the search warrant and seizure provisions of G.L. c. 64C, § 8.^[6] [\(#_ftn5\)](#)

C. New Excise on Vaping Products

As of June 1, 2020, the Act imposes an excise on ENDS held in the Commonwealth at a rate of 75% of the wholesale price of the ENDS.^[7] [\(#_ftn6\)](#) The excise is imposed on an ENDS distributor at the time that the ENDS is manufactured, purchased, imported, received or acquired in the Commonwealth. No excise is imposed on ENDS that are exported from the Commonwealth. Marijuana products are not subject to the excise imposed on ENDS under new G.L. c. 64C, § 7E(m).^[8] [\(#_ftn7\)](#)

The “wholesale price”^[9] [\(#_ftn8\)](#) is calculated as follows:

- in the case of an ENDS manufacturer,^[10] [\(#_ftn9\)](#) the price set for the ENDS, or, if no price has been set, the wholesale value of the ENDS;
- in the case of an ENDS distributor,^[11] [\(#_ftn10\)](#) the price at which the distributor purchased the ENDS; or

- in the case of an ENDS retailer^[12] ([#_ftn11](#)) or a consumer, the price at which the retailer or consumer purchased the ENDS.

An ENDS distributor must state on all invoices to its retailers that the ENDS excise has been paid. If this statement does not appear on the invoice, the retailer should assume that the excise has not been paid and that the retailer therefore must pay the excise.

D. ENDS Dealer Licensing and Return Filing Requirements

1. Licensing Requirements

As of June 1, 2020, the Act requires ENDS distributors and retailers who are distributing or selling ENDS in Massachusetts to first obtain a license from the Department. There is no fee to apply for a license. An ENDS retailer license will be effective for two years, while an ENDS distributor license will be effective for one year. License applications are required to be submitted using the Department's online application in [MassTaxConnect](#) (https://mtc.dor.state.ma.us/mtc/_/).

2. Return and Payment Requirements

Pursuant to the Act, every distributor licensed to sell ENDS is required to file a return with the Department to report the quantity of ENDS sold and to remit the ENDS excise due. Returns will be required to be filed electronically through [MassTaxConnect](#) (https://mtc.dor.state.ma.us/mtc/_/) on a monthly basis and are due on or before the 20th day of the month following the previous month. The first return due date for persons in the business of distributing ENDS as of June 1, 2020 will be July 20, 2020.

E. Collection and Pre-payment of Sales Tax on All ENDS Products

The Act amends G.L. c. 64H, § 3A to require every person selling ENDS products for resale in Massachusetts to pre-pay the sales tax on such products held for retail sale, beginning June 1, 2020.^[13] ([#_ftn12](#)) The sales tax is to be calculated on each sale by multiplying the sales tax rate set by G.L. c. 64H, § 2 (currently 6.25%) by the price at which such person sells ENDS products at wholesale. When calculating the sales tax, the wholesale price must include the amount of any excise previously paid with respect to the ENDS products

being sold. The amount of the sales tax must be separately stated on the customer invoice or other sales record.

G.L. c. 64H, § 3A does not apply to manufacturers to the extent they distribute ENDS products through a licensed distributor.

G.L. c. 64H, § 3A allows a retailer of ENDS to deduct the amount of the sales tax that it paid to a wholesaler from the total amount of sales tax due from such retailer for that period. Retailers should report such pre-payments on their monthly sales and use tax returns.

F. Potential Consumer Liability

Under the Act, every resident in Massachusetts is required to pay the ENDS excise on ENDS in his possession on which the excise was not paid by an ENDS distributor or retailer.^[14] ([#_ftn13](#)) The Department will presume that the excise has not been paid if a resident cannot produce an invoice or sales receipt from an ENDS distributor or retailer. A resident that is required to pay the excise must register with the Department and file a monthly return electronically through [MassTaxConnect](https://mtc.dor.state.ma.us/mtc/_/) (https://mtc.dor.state.ma.us/mtc/_/). A return is required to be filed only for any month when tax is due. If no tax is due, no return is required to be filed. Returns filed on a monthly basis are due on or before the 20th day of the month for ENDS acquired the previous month.

G. Penalties

Pursuant to the Act,^[15] ([#_ftn14](#)) in addition to penalties applicable under G.L. c. 62C, the Department may impose penalties under G.L. c. 64C, § 7E(l) on any person who:

- sells, offers for sale or possesses ENDS with the intent to sell them, or acts as an ENDS distributor or retailer, without being licensed by the Department;
- knowingly sells or solicits orders for ENDS to be shipped, mailed, sent, or brought into Massachusetts to anyone other than a licensed ENDS distributor or retailer, unless the ENDS are to be sold to or through a licensed ENDS distributor or retailer;

- knowingly possesses any container of ENDS that does not have the name and address of the person receiving the ENDS from the manufacturer;
- knowingly possesses any container of ENDS where the name and address of the person receiving the ENDS from the manufacturer has been erased or defaced; or
- files a false return, affidavit or statement.

For the above listed offenses, a person may be subject to a civil penalty of not more than \$5,000 for the first offense and not more than \$25,000 for a second or subsequent offense.^[16] ([#_ftn15](#))

/s/Geoffrey E. Snyder
Geoffrey E. Snyder
Commissioner of Revenue

GES:RHF:rmh

June 1, 2020

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^[1] ([#_ftnref1](#)) St. 2019, c. 133.

^[2] ([#_ftnref1](#)) St, 2019, c. 133, § 16.

^[3] ([#_ftnref2](#)) *Id.*

^[4] ([#_ftnref3](#)) *Id.*

^[5] ([#_ftnref4](#)) See Department of Public Health regulation 105 CMR 665.000;
<https://www.mass.gov/guides/2019-tobacco-control-law> ([/guides/2019-tobacco-control-law](#)).

[\[6\]](#) ([#_ftnref5](#)) St. 2019, c. 133, § 16.

[\[7\]](#) ([#_ftnref6](#)) *Id.*

[\[8\]](#) ([#_ftnref7](#)) *Id.*

[\[9\]](#) ([#_ftnref8](#)) *Id.*

[\[10\]](#) ([#_ftnref9](#)) An ENDS manufacturer is included in the definition of an ENDS distributor in the Act. An ENDS manufacturer is a person who manufactures ENDS in the Commonwealth. St. 2019, c. 133, § 16.

[\[11\]](#) ([#_ftnref10](#)) An ENDS distributor is a person who imports or causes to be imported into Massachusetts an ENDS for sale; or a person who is authorized by the Commissioner of Revenue to make returns and pay the excise on ENDS sold, shipped or delivered by them to a person in Massachusetts. St. 2019, c. 133, § 16.

[\[12\]](#) ([#_ftnref11](#)) An ENDS retailer is a person who sells or furnishes ENDS for individual use and not for resale purposes. St. 2019, c. 133, § 16.

[\[13\]](#) ([#_ftnref12](#)) St. 2019, c. 133, § 17.

[\[14\]](#) ([#_ftnref13](#)) St. 2019, c. 133, § 16.

[\[15\]](#) ([#_ftnref14](#)) St. 2019, c. 133, § 16; G.L c. 64C, § 7E(i) and (l).

[\[16\]](#) ([#_ftnref15](#)) St. 2019, c. 133, § 16.

REFERENCED SOURCES:

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